INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Barker v. *Wingo*, 407 U.S. 514	12
Boyce Motor Lines v. *United States*, 342 U.S. 337	8
Broadrick v. *Oklahoma*, 413 U.S. 601	7
Duncan v. *Louisiana*, 391 U.S. 145	9
Frank v. *United States*, 395 U.S. 147	8-9
Opper v. *United States*, 348 U.S. 84	12
Parker v. *Levy*, 417 U.S. 733	7
United States v. *Comi*, 336 F.2d 856, certiorari denied, 379 U.S. 992	10
United States v. *Harriss*, 347 U.S. 612	8
United States v. *Perez*, 489 F.2d 51, certiorari denied, 417 U.S. 945	12
United States v. *Petrillo*, 332 U.S. 1	8
United States v. *Sheppard*, 455 F.2d 1081	9

Constitution, statutes and rules:

United States Constitution:	
First Amendment	7
Sixth Amendment	2, 8, 11, 12

Constitution, statutes and rules—Continued Page

18 U.S.C. 506 10
18 U.S.C. 701 ..... 2, 3, 6, 7, 9
26 U.S.C. 7206 10
26 U.S.C. 7212 10
28 U.S.C. 144 10
Fed. R. Crim. P., Rule 8(b) 12
Fed. R. Crim. P., Rule 14 12
Fed. R. Evidence, Rule 803(6) 13

Miscellaneous:

H. R. Rep. No. 1044, 72d Cong., 1st Sess. (1932) 6

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1450

FRANCIS STORY GOELTZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6571

KARL JACK BRAY and ROBERT GEORGE WRAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 513 F.2d 193 (Goeltz Pet. App. A1-A9; Bray Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1975. Mr. Justice White extended the time for filing the petitions for a writ of certiorari to May 20, 1975, and the petitions were filed on May 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 701 was properly applied to petitioners' conduct in this case, and, if so, whether it is unconstitutionally overbroad or vague.
2. Whether petitioners' request for a jury trial was properly rejected where the maximum sentence they could receive was a term of six months' imprisonment and a fine of $250.
3. Whether there was probable cause for petitioners' arrests.
4. Whether the trial judge properly refused to recuse himself.
5. Whether petitioner Goeltz was deprived of his Sixth Amendment right to a speedy trial.
6. Whether certain evidence concerning petitioners Bray and Wray was properly authenticated.

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STATUTE INVOLVED

18 U.S.C. 701 provides:

> Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both.

STATEMENT

After a non-jury trial in the United States District Court for the District of Utah, petitioners were convicted on one count of possessing a seizure notice of the United States Treasury Department and the Internal Revenue Service prescribed for the use of its officers and employees, or a colorable imitation thereof, in violation of 18 U.S.C. 701. Petitioners Goeltz and Bray were each sentenced to a term of six months' imprisonment and ordered to pay a $250 fine. Petitioner Wray was sentenced to a term of three years' probation and ordered to pay a $250 fine. The court of appeals affirmed (Goeltz Pet. App. A1-A9; 513 F.2d 193).

The evidence showed that on the evening of April 5, 1973, at a meeting held at petitioner Bray's office

and conducted by petitioner Goeltz for the purpose of opposing federal taxes, Bray informed those in attendance that on April 14, 1973, Internal Revenue Service seizure notices [1] would be placed on automobiles; that these would cause their owners to become angry and complain to the Internal Revenue Service (IRS); and that "good publicity" would result (Tr. 32-33, 52-53).[2]

On April 13, 1973, Dale Stephens, an IRS Special Agent working undercover, telephoned Goeltz to ask when the seizure notices would be distributed to the group. Goeltz told him that the seizure notices had not yet been printed, but they would be ready on April 16, 1973 (Tr. 34-35, 53-54).

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[1] These notices are official documents which can be used lawfully only by revenue officers to collect taxes for the federal government when other means to collect the taxes have failed (Tr. 7). The IRS seal is affixed to the upper left hand corner of each seizure notice (Tr. 7-9).

The notices state (Goeltz Pet. App. C):

WARNING

UNITED STATES GOVERNMENT SEIZURE

This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property, in any manner, under severe penalty of the law.

A check of IRS records revealed that none of the petitioners was authorized either to possess or to use the notices (Tr. 8-10).

[2] "Tr." designates the transcript of the trial in the district court.

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On April 19, 1973, Bray told Stephens that the seizure notices had been printed and that "we are going to do some midnight riding" (Tr. 36-37, 54-55). Goeltz, Bray, petitioner Wray, and Agent Stephens were present at the meeting that evening (Tr. 40, 55). Goeltz brought the seizure notices and requested that each person at the meeting take some of them and place them on vehicles during subsequent nights (Tr. 41). Goeltz warned that each person should be discreet about where he placed the notices and that the notices should be placed where IRS agents would normally place them; that, if they were apprehended while placing a notice on a vehicle, they should say that they were just replacing it, after it had fallen off the vehicle; that they should not have more than one seizure notice in their possession at one time; and that they should use cotton gloves while attaching the seizure notices to avoid leaving fingerprints (Tr. 41-42). When the meeting disbanded, petitioners picked up seizure notices and departed (Tr. 43-45).

Agent Stephens then notified other agents who were stationed outside the meeting that every person leaving the meeting was in possession of IRS seizure notices (Tr. 49). Petitioner Bray was thereupon apprehended and arrested as he walked from the meeting to his car, carrying several seizure notices (Tr. 133-138). Goeltz was apprehended and arrested when he reached his home; he was also found to be in possession of several IRS seizure notices (Tr. 116-117, 124-126). Wray was also apprehended and arrested at Goeltz's home, and a stack of IRS seizure

notices was found in the vehicle he drove from the meeting (Tr. 91-94).

ARGUMENT

1. Petitioner Goeltz contends (Pet. 18-24) that his conduct did not come within the purview of 18 U.S.C. 701, since the seizure notices in his possession were not a "badge, identification card, or other insignia" of a government agency. The term "insignia," however, when considered in context and in view of the legislative purpose of the statute, is clearly meant to include such indicia of governmental authority as an IRS seizure notice. IRS seizure notices are intended to be used only by IRS agents and officials for the purpose of collecting taxes for the federal government (Tr. 7). The IRS seal is affixed to the upper left on each notice (Tr. 7-8). 18 U.S.C. 701 is plainly intended to prevent misrepresentation of government authority through the improper use of such indicia. See H. R. Rep. No. 1044, 72d Cong., 1st Sess. 1-2 (1932) (Goeltz Pet. App. B3-B4).

2. Petitioners contend (Goeltz Pet. 11-15; Bray Pet. 15-17) that 18 U.S.C. 701 is unconstitutionally overbroad and vague. We submit, however, that the statute's proscription against possession of "insignia * * * prescribed * * * for use by any officer or employee [of the United States] * * * except as authorized" comprehends conduct that is easily identifiable. The statute is a reasonably narrow prohibition directed against the evil sought to be avoided—misrepresentation of governmental authority.

BLEED THROUGH

This Court has repeatedly refused to strike down a statute as overbroad on its face where there were a substantial number of situations to which it could be validly applied. "Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct * * *'" (*Parker* v. *Levy*, 417 U.S. 733, 760, quoting from *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 580-581). And as this Court recognized in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, "where conduct and not merely speech is involved" the overbreadth, to be fatal, must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." While there could be marginal applications of 18 U.S.C. 701 that are arguably contrary to the First Amendment—where, for example, the government insignia at issue are employed with the intention of conveying a political message rather than misleading the public—such potential overbreadth is insubstantial in relation to the unquestionably valid scope of the legislation.[3]

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[3] Petitioner Goeltz further contends (Pet. 11-14) that the statute as applied violated his First Amendment rights. As the court of appeals noted, however, petitioner's conduct was "of the dirty-trick variety and was for the purpose of enraging its victims and annoying IRS" rather than expressing ideas (Goeltz Pet. App. A6).

The phrase "possesses any * * * insignia * * * prescribed * * * for use by any officer or employee [of the United States] * * * except as authorized" is not impermissibly vague. It reaches a precise and readily ascertainable type of conduct and conveys a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8. As the Court observed in *Boyce Motor Lines* v. *United States*, 342 U.S. 337, because of the necessary imprecision of language, only a "reasonable degree of certainty can be demanded" of any legislation (*id.* at 340). Moreover, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*United States* v. *Harriss*, 347 U.S. 612, 618). Here, the statute is clear in prohibiting what was done in this case—the unauthorized possession of governmental insignias for the purpose of misleading the public.

3. Petitioners contend (Goeltz Pet. 25-26; Bray Pet. 6-7) that the district court's denial of their motions for a jury trial violated their Sixth Amendment rights. The statute that petitioners were charged with violating defines a minor offense that carries a maximum penalty of six months' imprisonment and a $250 fine. It is well established that the Sixth Amendment guarantee of a jury trial does not apply to such offenses. *Frank* v. *United States*, 395

BLEED THROUGH

U.S. 147, 148; *Duncan* v. *Louisiana*, 391 U.S. 145, 162 n. 35.[4]

4. Petitioners contend (Goeltz Pet. 27-29; Bray Pet. 7-9) that they were unlawfully arrested because the misdemeanor with which they were charged was not committed in the presence of the agents who arrested them. Prior to arresting petitioners, however, the agents learned from Agent Stephens that each person who left the meeting was in possession of IRS seizure notices. Agent Stephens also knew of petitioners' purpose in possessing the notices and that petitioners were not authorized to have them. Imputing his knowledge to the other agents, *United States* v. *Sheppard*, 455 F.2d 1081, 1083 (C.A. 10), the arresting agents had probable cause to believe that petitioners, when apprehended soon after the meeting, were in unauthorized possession of the notices, in violation of 18 U.S.C. 701. Moreover, as the court of appeals noted (Goeltz Pet. App. A6-A7), since Agent Stephens was aware of petitioners' unauthorized receipt of the notices, he had probable cause to believe that petitioners had committed at least one of several felonies, including possessing a counterfeit seal (in violation of 18 U.S.C. 506), uttering false

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[4] Contrary to petitioners' contention, the fact that the court initially told petitioners that they were entitled to a jury trial but subsequently realized its mistake and denied their motions prior to trial did not vest them with any right to a jury trial. Petitioners cite no authority for the proposition that an erroneous ruling of this nature may not be corrected by the court prior to trial, and we know of none.

statements (in violation of 26 U.S.C. 7206) or interfering with administration of IRS regulations (in violation of 26 U.S.C 7212). And, since his knowledge could be imputed to the other agents, the agents had probable cause to make felony arrests. See *United States* v. *Comi*, 336 F.2d 856, 857-858 (C.A. 4), certiorari denied, 379 U.S. 992. The fact that prosecutorial discretion was exercised to charge only a misdemeanor could not retroactively invalidate the arrests.

5. Petitioners also contend (Goeltz Pet. 32-33; Bray Pet. 16-17) that the trial court judge should have recused himself from their case, since petitioners Bray and Goeltz previously had organized a group that sought to impeach the judge,[5] and that they did not receive a fair trial, since there was a "hostile atmosphere" in the court when their case was heard (Goeltz Pet. 32). As the court of appeals concluded after examining the entire record, however, there is

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[5] Prior to trial, petitioner Bray moved, pursuant to 28 U.S.C. 144, for an order to have a different judge assigned to the case on the ground that Bray had organized a drive to impeach the judge, and the judge had dismissed a civil suit in which Bray was a plaintiff (R. 50). Neither petitioner Wray nor petitioner Goeltz joined in the motion, which was denied prior to trial. As the court of appeals noted (Goeltz Pet. App. A8), the motion did not meet the requirement, under 28 U.S.C. 144, that an affidavit alleging personal bias "shall state the facts and the reasons for the belief that bias or prejudice exists * * *." Instead, it stated conclusions and showed "at the most that Bray did not like Judge Ritter not that Judge Ritter was prejudiced against Bray. A decision [by the judge] against Bray in another case does not show prejudice."

BLEED THROUGH

no ground for finding the trial court judge was biased or prejudiced against petitioners (Goeltz Pet. App. A9). Petitioners' activities in trying to impeach the judge and their "impertinent and contemptuous behavior" (*ibid.*) during trial showed that they disliked the judge, rather than that the judge disliked them. "A party may not taunt a judge into a reprimand and then on appeal claim the reprimand was justification for a new trial" (*ibid.*).[6]

6. Petitioner Goeltz contends (Pet. 36-37) that he was deprived of his Sixth Amendment right to a speedy trial. Petitioners were arrested on April 19, 1973, the information was filed on April 20, 1973, and the trial occurred on March 13, 1974. Between May 29, 1973, and March 11, 1974, petitioners filed approximately 24 motions. The government never requested any delay. Goeltz did not file a motion to dismiss for want of speedy trial until March 4, 1974 (R. 66).[7] The record does not show that petitioners were prejudiced in any way from the delay, nor does Goeltz assert any such prejudice. As the court

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[6] Petitioners do not point to any particular instances of "hostility" or prejudice. At several points in the trial, petitioner Bray accused the trial judge of being prejudiced against him (Tr. 108, 175). Petitioner Bray also desired to dispense with his court-appointed counsel in order to be represented by a person who was not a member of the bar. When the judge did not allow Bray to do so, Bray objected, and the judge stated that Bray was being impertinent (Tr. 64). These incidents do not establish that the trial judge was prejudiced against Bray.

[7] Bray and Wray filed similar motions on March 8, 1974, and March 11, 1974, respectively (R. 68, 72-73).

below held (Goeltz Pet. App. A7-A8), in these circumstances petitioner's right to a speedy trial was not denied. *Barker* v. *Wingo*, 407 U.S. 514, 530.[8]

7. Petitioners Bray and Wray contend (Bray Pet. 15-16) that the court denied them their Sixth Amendment right to confrontation when it admitted evidence without proper foundation. During trial, the government produced a document from the IRS data processing center in Detroit, Michigan, showing that petitioners had never been employed by the IRS (Tr. 11-13). Mr. Roland Wise, the IRS District Director for Utah, who was custodian of the document, testified that the document had been produced by the data processing center in the regular course of business after he had sent the center a teletype request for a computer search of IRS records to determine if any one of petitioners was an IRS employee (Tr. 5, 10-11). Petitioners objected to the introduction of the document because Wise had not personally overseen the computer search of the IRS records in Detroit. It is well established, however, that records made in

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[8] Petitioner Goeltz additionally contends that he was prejudiced by the failure of the trial court to grant his July 23, 1973, motion for severance. (Goeltz Pet. 35). The decision to grant or to deny severance is, however, a matter within the court's discretion, Fed. R. Crim. P. 8(b), 14; see *United States* v. *Perez*, 489 F.2d 51, 64-65 (C.A. 5), certiorari denied, 417 U.S. 945. Here, the court did not abuse its discretion in denying severance. The facts and legal issues were the same with regard to each defendant, as was the evidence. Petitioner Goeltz does not allege how he was prejudiced by the court's denial of his motion to sever. See *Opper* v. *United States*, 348 U.S. 84, 94-95.

BLEED THROUGH

the regular course of business may be authenticated by the testimony of their custodian. See Rule 803 (6), Fed. R. Evid.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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